

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

In re

CUSTOMS AND TAX ADMINISTRATION OF THE KINGDOM OF DENMARK (SKATTEFORVALTNINGEN) TAX REFUND SCHEME LITIGATION	MASTER DOCKET 18-md-02865-LAK
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This document relates to: The cases identified
 in Appendix A

**DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR
MOTION FOR ISSUANCE OF A REQUEST FOR INTERNATIONAL
JUDICIAL ASSISTANCE TO OBTAIN EVIDENCE IN DENMARK**

PRELIMINARY STATEMENT

Defendants’ motion seeking to take depositions of six witnesses located in Denmark—witnesses who undoubtedly would have been deposed already were it not for the reality that every person knowledgeable about SKAT’s conduct resides outside the Court’s subpoena power—is timely and should be granted. Defendants filed their second motion for the issuance of letters rogatory on March 6, 2021 (the “Second Motion”), ECF No. 548, and moved to renew the Second Motion as soon as practicable after the depositions of SKAT’s 30(b)(6) witnesses (the “Renewed Motion”), ECF No. 599. SKAT has opposed both motions as untimely, chiding Defendants for not filing the Second Motion earlier in the litigation. ECF No. 605 (“Opp.”) at 7. But SKAT apparently considered its discovery needs to be timely when it filed a motion for letters rogatory on April 9, 2021, ECF No. 567, more than a month after Defendants filed their Second Motion. Where the parties continue to engage in discovery, and SKAT is scheduling depositions, serving discovery requests, and producing thousands of documents—as recently as today, June 3, 2021—SKAT’s position that Defendants “waited too long” to file this motion is indefensible. Further, there is no prejudice to SKAT. It does not control or represent these witnesses and will not need to defend their depositions.

SKAT’s argument that the Renewed Motion is premature is similarly unavailing. It is unclear when, or even *if*, the Danish authorities will act on the letters of request relating to Jette Zester and Leif Normann Jeppesen. If, as SKAT asserts, the Renewed Motion cannot be heard until after Zester and Jeppesen have been deposed, then Defendants may indefinitely be blocked from renewing their motion for the issuance of letters rogatory directed at these six witnesses. This makes no sense. Defendants have met their burden under the Hague Convention and SKAT’s documents and testimony taken to date establish that Dorthe Pannerup Madsen, Kjeld

Rasmussen, Rene Frahm Jørgensen, Laurits Cramer, Jens Sørensen, and Helen Sørensen each have unique and relevant knowledge extending beyond SKAT's Rule 30(b)(6) testimony or the remaining scheduled depositions of fact witnesses. These individuals would be deposed if they lived in the United States, and Defendants should not be prejudiced in their ability to pursue relevant discovery because they have been sued by the tax authority of a foreign sovereign.

SKAT did not oppose the Second Motion with respect to Madsen and Helen Sørensen, ECF No. 553 at 1 n.1, and does not oppose the Renewed Motion with respect to these two witnesses on the grounds of relevance, materiality, or proportionality. Opp. 2 n.3. The Court should grant Defendants' request to depose Madsen and Helen Sørensen. While SKAT also did not oppose the Second Motion with respect to Jørgensen, Cramer, or Jens Sørensen, ECF No. 553 at 1 n.1, SKAT now reverses course and argues that their testimony and the testimony of Rasmussen would be cumulative or irrelevant. But SKAT has no compelling basis to oppose the Renewed Motion on this ground regarding these four witnesses. Defendants seek testimony from each witness that bears directly on various defenses, including in relation to causation, failure to mitigate, contributory or comparative fault, and the statute of limitations. Defendants respectfully request that the Court grant this relief as to these six witnesses.

ARGUMENT

I. SKAT's Arguments That The Motion Is Premature Or Untimely Are Baseless

Defendants must seek the Court's assistance in issuing letters rogatory because key witnesses with information relevant to the defenses at issue reside in Denmark and are therefore beyond the Court's subpoena power. SKAT seeks to take advantage of this circumstance (which it created when it brought suit in the United States instead of Denmark) by continuing its own ongoing discovery efforts, while simultaneously opposing Defendants' renewed motion on the

ground that Defendants “waited far too long” to move for this Court’s assistance in issuing letters of request. Opp. 2. But SKAT does not appear to view itself as having “waited far too long” to serve document requests and schedule depositions, among the range of discovery efforts undertaken by SKAT this past month. On May 28, 2021, SKAT served subpoenas for bank records on more than a dozen financial institutions. As the end of fact discovery approaches on June 30, SKAT has continued to produce thousands of English translations of responsive Danish documents, including a production of over 2,500 pages on June 3, 2021, which are invaluable to Defendants’ ability to effectively depose Danish witnesses. And as recently as May 28, 2021, SKAT produced over 2,000 documents in Danish, including previously unproduced communications and documents relating to Lisbeth Rømer, Anne Munksgaard, Lill Helene Drost, and other SKAT employees, whom Defendants will depose imminently. Indeed, Rømer’s deposition took place today. The opposition’s argument that Defendants have engaged in “unjustified delay,” Opp. 7, is meritless where SKAT’s recent actions indicate that it is not close to completing its own discovery efforts and obligations.

SKAT also argues that Defendants’ motion is “premature” and depositions of Jeppesen and Zester in Denmark are necessary to judge the proportionality of the requested discovery. Opp. 1, 6. But under SKAT’s logic, Defendants’ renewed motion may never be timely, regardless of when the Second Motion was filed. SKAT acknowledges that it has sought the parties’ agreement that fact discovery should close in less than 30 days and that the process of seeking testimony pursuant to the Hague Convention is “lengthy and uncertain.” Opp. 2-3.¹ If

¹ During discussions about the discovery schedule, there has been no agreement between the parties that the end of fact discovery would terminate the ability to obtain testimony in Denmark. Lead Counsel informed SKAT that its proposal to end fact discovery in June 2021 “does not in any way turn on the outcome of the process for requesting letters rogatory,” and noted that “[t]o the extent the Danish authorities approve the taking of any discovery in Denmark after June 30, 2021, the parties can discuss at that time any issues regarding the use of such discovery in this litigation.” ECF No. 555 at 9.

the Danish authorities agree to allow Jeppesen and Zester to be deposed after June 30, 2021, SKAT will no doubt insist that the period for discovery is closed and no additional depositions can be scheduled. With no guarantee as to when, or even if, the depositions of Jeppesen and Zester will move forward, Defendants have no choice but to renew their motion now.

This is particularly the case when the depositions that have been taken to date already establish that the six witnesses subject to this motion have relevant knowledge distinct from the testimony sought from Jeppesen and Zester. Jeppesen was a former director of SKAT's legal department; Defendants will probe his identification of serious concerns about the issues raised by borrowed shares, beneficial ownership, and dividend entitlement, the operational definitions of these terms as applied by SKAT, and his warning that SKAT needed to overhaul its system to be equipped to manage these risks. *See* ECF No. 549 at 9-10. Zester, on the other hand, was a special consultant at SKAT whose testimony on the specific warnings she raised that SKAT was paying refunds blindly and why these warnings were not addressed bear directly on Defendants' defenses. *See* ECF No. 549 at 10. For the reasons set out below, there is ample distinction between Jeppesen and Zester's roles and those of the witnesses who are the subject of this motion. Defendants' motion is not premature and ought not to hinge on the timing of these depositions.

II. The Testimony Of The Six Witnesses Is Relevant And Not Cumulative

SKAT does not oppose the Renewed Motion with respect to Dorthe Pannerup Madsen or Helen Sørensen on the grounds of relevance, materiality, or proportionality. Opp. 2 n.3. The Court should grant Defendants' renewed request to depose Madsen and Helen Sørensen. As to Kjeld Rasmussen, Rene Frahm Jørgensen, Laurits Cramer, and Jens Sørensen, there is also ample support for the relevance and proportionality of the testimony sought by this Renewed

Motion. With their knowledge of separate aspects of the administration of dividend withholding tax and repeated warnings of insufficient internal controls and resources during the key period, these witnesses can offer unique testimony relevant to causation, failure to mitigate, statute of limitations, contributory or comparative fault, and other defenses in this litigation.

A. Rene Frahm Jørgensen

SKAT did not oppose Defendants' prior request for Jørgensen's testimony. ECF No. 553 at 1 n.1. SKAT's argument now that there is no need for Jørgensen to testify is unavailing, as neither the testimony of Christian Ekstrand nor Rømer can substitute for Jørgensen's. Only Jørgensen can testify about his approval of the monthly account statements showing refund payments outpacing the collection of corresponding tax payments and his decision not to inquire further. ECF No. 599 at 10-11. Defendants questioned Ekstrand in his Rule 30(b)(6) capacity about an account statement reflecting SKAT's steadily increasing amount of dividend tax refunds paid to foreign investors, which Ekstrand testified that he had not previously seen.² But because Jørgensen was responsible for overseeing the account statements, only Jørgensen can answer Defendants' questions about *why* he approved statements showing that SKAT paid more in tax refunds than it received from Danish companies in withheld tax and *why* he did not flag the issue for his superiors. ECF No. 599 at 10-11. Rømer similarly cannot testify as to Jørgensen's decision-making in declining to raise to SKAT Director Jesper Rønnow Simonsen the concerns Rømer flagged in a memo on SKAT's insufficient control over the disbursement of withheld dividend tax, despite Rømer addressing the November 2013 memo to Simonsen. ECF No. 599 at 11.

² See ECF No. 606-2, Declaration of Marc A. Weinstein, Ex. 2 (Ekstrand Dep. Tr.) at 55:25-56:6.

B. Kjeld Rasmussen

By characterizing Rasmussen as a “fourth witness” on the 2010 and 2013 audit reports, Opp. 7, SKAT’s opposition attempts to minimize Rasmussen’s unique vantage point as the head of SIR (the Ministry of Taxation’s internal audit department) while it produced multiple reports critical of SKAT that seemingly went unheeded. ECF No. 599 at 9-10. Rasmussen’s personal knowledge of the process for creating the reports and SKAT’s failure to adequately address them makes him suitable for questions that Defendants could not have asked Ekstrand as SKAT’s corporate designee on the audit reports. SKAT argues that Bo Dugaard could answer any questions about the 2010 audit report because he worked in the internal audit department, Opp. 8, but Dugaard will not be able to testify to Rasmussen’s decision-making while responsible for overseeing SIR (which Dugaard left in 2011), Rasmussen’s communications with SKAT and the Ministry of Taxation about the problems that SIR identified, and Rasmussen’s view of what needed to be done at SKAT to remedy these issues. This testimony is directly relevant to understanding whether the conduct of SKAT or the Ministry of Taxation contributed to the alleged injuries, but SKAT has not agreed to produce a witness with Rasmussen’s tenure spanning both reports and his specific knowledge of SKAT’s failure to heed the audit reports’ warnings and recommendations.

C. Jens Sørensen

SKAT also did not previously oppose Defendants’ prior request for Jens Sørensen’s testimony. ECF No. 553 at 1 n.1. Now, SKAT argues that Defendants do not need Sørensen’s testimony because Defendants have questioned SKAT’s 30(b)(6) witnesses about the critical audit reports. Opp. 9. But Sørensen, who was the former Head of Recovery at SKAT, can offer a unique perspective on remedial actions taken as a result of recommendations reported by the

working groups established after the audit reports. ECF No. 599 at 12-13. SKAT's early awareness of significant control deficiencies illustrates its negligence. Because Sørensen oversaw these working groups, his testimony is crucial to understanding steps taken or not taken in response to the 2013 SIR report—testimony that cannot be offered by others witnesses such as Lisbeth Rømer.

D. Laurits Cramer

SKAT did not oppose Defendants' prior request for Cramer's testimony, ECF No. 553 at 1 n.1, but now argues that there is no need for Defendants to depose Cramer because control gaps and resource constraints were topics on which defendants questioned SKAT's 30(b)(6) witness. Opp. 10. However, Ekstrand and Jens Brøchner could not testify about the specific control deficiencies of which Cramer is aware based on his particular role in the dividend refund process. Cramer's public statements indicate that he had no ability to verify the information in the dividend tax refund applications that he was personally responsible for reviewing. ECF No. 599 at 11-12. SKAT's 30(b)(6) testimony could not speak to Cramer's view of the deficiencies in SKAT's process for reviewing refund applications by foreign shareholders and his warnings as to those deficiencies.

III. CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court grant this Motion for Issuance of Requests for International Judicial Assistance to Obtain Evidence.

Dated: New York, New York
June 3, 2021

Respectfully submitted,

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APPENDIX A

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Elizabeth van Merkensteijn		19-cv-01893
Azalea Pension Plan		19-cv-01893
Basalt Ventures LLC Roth 401(K) Plan		19-cv-01866
Bernina Pension Plan		19-cv-01865
Bernina Pension Plan Trust		19-cv-10713
Michelle Investments Pension Plan		19-cv-01906
Omineca Pension Plan		19-cv-01894
Omineca Trust		19-cv-01794 19-cv-01798 19-cv-01788 19-cv-01918 19-cv-01928 19-cv-01931

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Remece Investments LLC Pension Plan		19-cv-01911
Starfish Capital Management LLC Roth 401(K) Plan		19-cv-01871
Tarvos Pension Plan		19-cv-01930
Voojo Productions LLC Roth 401(K) Plan		19-cv-01873
Xiphias LLC Pension Plan		19-cv-01924
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Jocelyn Markowitz		19-cv-01904
Avanix Management LLC Roth 401(K) Plan		19-cv-01867
Batavia Capital Pension Plan		

Calypso Investments Pension Plan		19-cv-01895 19-cv-01904
Cavus Systems LLC Roth 401(K) Plan		19-cv-01869
Hadron Industries LLC Roth 401(K) Plan		19-cv-01868
RJM Capital Pension Plan		19-cv-01898
RJM Capital Pension Plan Trust		19-cv-10713
Routt Capital Pension Plan		19-cv-01896
Routt Capital Trust		19-cv-01783 19-cv-01922 19-cv-01926 19-cv-01929 19-cv-01812 19-cv-01870 19-cv-01792 19-cv-01806 19-cv-01808 19-cv-01815
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RAK Investment Trust		
Aerovane Logistics LLC Roth 401(K) Plan		18-cv-07828
Edgepoint Capital LLC Roth 401(K) Plan		18-cv-07827
Headsail Manufacturing LLC Roth 401(K) Plan		18-cv-07824
The Random Holdings		

401(K) Plan		18-cv-07829
The Stor Capital Consulting LLC 401(K) Plan		18-cv-04434
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		1:19-cv-01781
		1:19-cv-01791
		1:19-cv-01794
David Zelman		1:19-cv-01918
		1:19-cv-01783
		1:19-cv-01798
		1:19-cv-01788
Edwin Miller		1:19-cv-01926
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Dicot Technologies LLC Roth 401(K) Plan	1:19-cv-01785
Fairlie Investments LLC Roth 401(K) Plan	1:19-cv-01788
First Ascent Worldwide LLC Roth 401(K) Plan	1:19-cv-01791
Battu Holdings LLC Roth 401(K) Plan	1:19-cv-01792
Cantata Industries LLC Roth 401(K) Plan	1:19-cv-01794
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Monomer Industries LLC Roth 401(K) Plan	1:19-cv-01800
Limelight Global Productions LLC Roth 401(K) Plan	1:19-cv-01801
Loggerhead Services LLC Roth 401(K) Plan	1:19-cv-01803
PAB Facilities Global LLC Roth 401(K) Plan	1:19-cv-01806
Plumrose Industries LLC Roth 401(K) Plan	1:19-cv-01808
Pinax Holdings LLC Roth 401(K) Plan	1:19-cv-01809
Roadcraft Technologies LLC Roth 401(K) Plan	1:19-cv-01810
Sternway Logistics LLC Roth 401(K) Plan	1:19-cv-01812
Trailing Edge Productions LLC Roth 401(K) Plan	1:19-cv-01813

<p>True Wind Investments LLC Roth 401(K) Plan</p> <p>Eclouge Industry LLC Roth 401(K) Plan</p> <p>Vanderlee Technologies Pension Plan</p> <p>Vanderlee Technologies Pension Plan Trust</p> <p>Cedar Hill Capital Investments LLC Roth 401(K) Plan</p> <p>Green Scale Management LLC Roth 401(K) Plan</p> <p>Fulcrum Productions LLC Roth 401(K) Plan</p> <p>Keystone Technologies LLC Roth 401(K) Plan</p> <p>Tumba Systems LLC Roth 401(K) Plan</p>		1:19-cv-01815
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		1:19-cv-01928
		1:19-cv-01929
		1:19-cv-01931
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American Investment Group of New York, L.P. Pension Plan		18-cv-09841
DW Construction, Inc. Retirement Plan		18-cv-09797
Kamco Investments Inc. Pension Plan		18-cv-09836
Kamco LP Profit Sharing Pension Plan		18-cv-09837

Linden Associates Defined Benefit Plan		18-cv-09838
Moirra Associates LLC 401K Plan		18-cv-09839
Newsong Fellowship Church 401K Plan		18-cv-10100
Riverside Associates Defined Benefit Plan		18-cv-09840
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Alexander Jamie Mitchell III		18-cv-10100
David Schulman		18-cv-09840
Joan Schulman		18-cv-09838
Darren Wittwer		18-cv-09797
John Doscas	Bryan C. Skarlatos	18-cv-4894
David Freelove	Eric Smith	18-cv-4899
	Kostelanetz & Fink, LLP	18-cv-8655
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